FILE COPY

FILED
OCT 24 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 34

BORAX CONSOLIDATED, LIMITED, A CORPORATION, AND PACIFIC COAST BORAX COMPANY, A CORPORATION, *Petitioners,*

vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY OF PETITIONERS TO BRIEF OF AMICI CURIÆ.

GURNEY E. NEWLIN,
A. W. ASHBURN,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Reply of petitioners to brief of amici curiæ	1
Attempted differentiation of Knight case	1
People v. San Francisco, 75 Cal. 394	3
Cragin v. Powell, 128 U. S. 691, misconstrued	4
Amici Curiæ refuse to acknowledge existence of jurisdiction over subject matter	4
Cases cited by amici curiæ are consistent with Knight decision	5
Pollard and Goodtitle cases misconstrued	9

Cases Cited.

Beard v. Federy, 3 Wall. 478	3
Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155	8
Cragin v. Powell, 128 U. S. 691	4
Crowell v. Benson, 285 U. S. 50	6
De Guyer v. Banning, 167 U. S. 723	2
Doolan v. Carr, 125 U. S. 618	7
Doran v. Central Pac. R. R. Co., 24 Cal. 245	6
Goodtitle v. Kibbe, 9 How. 471	9
Greene v. U. S., 274 Fed. 145	7
Hardin v. Jordan, 140 U. S. 371	7
Kirwan v. Murphy, 189 U. S. 35	7
Lane v. Darlington, 249 U. S. 331	7
People v. San Francisco, 75 Cal. 394	3
Pollard's Lessee v. Hagan, 3 How. 212	9
Russell v. Land Grant Co., 158 U. S. 253	6, 8
Stoneroad v. Stoneroad, 158 U. S. 240	7
United States v. Rhodes, 3 F. (2d) 771	7
United States v. State Investment, 264 U. S. 206	5, 7
Ward v. Mulford, 32 Cal. 372	6
Wright v. Roseberry, 121 U. S. 488	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 34

BORAX CONSOLIDATED, LIMITED, A CORPORATION, AND PACIFIC COAST BORAX COMPANY, A CORPORATION, *Petitioners*,

vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY OF PETITIONERS TO BRIEF OF AMICI CURIÆ.

ATTEMPTED DIFFERENTIATION OF KNIGHT CASE.

Amici curiæ, like counsel for the City of Los Angeles, make no effort to destroy or discredit the reasoning of the Knight decision or to disclose a later impairment of its doctrine by any decision of this Court. Tacitly they admit the ruling to be as stated by us. They merely seize upon

a factual distinction which presents no legal difference between the two cases.

The fact that the Knight survey was in a sense made in fulfillment of a treaty obligation neither adds to nor detracts from the function of the Land Department in making that survey. The treaty obligation did have much to do with the *court confirmation* of the Mexican grant but not with the *survey* which followed the same.

So far as statutory authority for the Knight survey is concerned, it is, at best, on a parity with that of Norway (O. B. 67-68); neither statute says anything about conclusiveness. And neither opinion in the Knight case places any stress upon the points now suggested by opposing counsel; they rest squarely upon the larger principal of authority of the Land Department, under general law, to make necessary surveys of public land, and upon the conclusive effect which attaches thereto as a matter of public policy in the interest of security of titles. In fact the only statutes concerning surveys which are stressed in those opinions are the sections of the Revised Statutes which were equally applicable to Norway's work (see p. 177).

De Guyer v. *Banning*, 167 U. S. 723 dealt with a decree which was likewise confirmative of a Mexican grant, but on general principles held the survey and patent to be controlling over the court decree although in derogation of the title there confirmed; that is, although the survey and patent omitted certain lands which had been included in the description of the court decree.

The *survey* of the Knight case was in no sense "confirmatory", as claimed by *amici curiæ* at page 23 of their brief. That phase of the matter ended with the court decree; the survey and resulting patent were not within the reviewing power of the court in any sense (see O. B. 61-63). The survey was definitive but not confirmatory. It defined

the line of "ordinary high water mark" of the San Francisco Bay (described in the decree) just as the Norway Survey defined the "ordinary high water mark" which was by law read into the description of Mormon Island and by express direction of the Commissioner (R. 671) into Norway's contract and oath which evidenced his obligation as surveyor.

Nor is there anything in the claim that the patent involved in the Knight case operated merely as a quitclaim. The matter found at page 188 of that decision (to which *amici curiæ* refer) is a portion of a quotation from the earlier case of *Beard* v. *Federy*, 3 Wall. 478. But pages 184 and 203 disclose the holding to be that the patent operated as a conclusive adjudication of pertinent underlying facts as well as a conveyance.

The claim of *amici curiæ* found in paragraph (5) page 23 of their brief proceeds upon a mistaken belief that the Knight case held tideland to have passed to the City of San Francisco because of the Mexican origin of the grant. This we have shown to be unsound; see O. B. pages 60, 64-5 and R. B. p. 6. The decree of confirmation had adjudged that only lands above ordinary high water mark had passed to the City and this Court held that, if any lands lying below that mark were included in the patent, it was due to an error of the Land Department but that its determination of that particular matter, even though erroneous, was conclusive in the same sense as a determination of any other tribunal acting within its jurisdiction.

PEOPLE v. SAN FRANCISCO, 75 CAL. 394.

Amici curiæ, like counsel for respondent, make no mention whatever of the above case. This is significant, for the decision is essentially on all fours with the Knight decision.

CRAGIN V. POWELL, 128 U. S. 691, MISCONSTRUED

The contention (expressed at p. 24) that the Cragin case turned upon the authority of the Land Department to define the boundaries of swamp lands is a mistaken one. That decision contains no reference to the effect of a swamp land selection or certification. On the contrary it rests upon general statutes and general principles; it upheld and declared conclusive the departmental survey of a part of the public domain adjoining such swamp land; the only question involved was that of boundary and the official survey of the Federal Government was held to be conclusive.

At the bottom of page 699 the court, in the Cragin case, conceded the principal contention now advanced by amici curiæ, that, after sale of land according to an official survey, the private rights thus created are subject to court protection against *corrective* surveys of the Department, but held it inapplicable to an *original* boundary survey.

The general principle was likewise conceded, but held inapplicable, at pages 176, 183 and 212 of 142 U. S. Mr. Justice Field said at page 212 (referring to such cases as *Wright* v. *Roseberry*): "They assert no new doctrine, but law, which has always existed and been recognized, *though seldom more misapplied than here.*" No attempt is now made to show wherein this learned jurist fell into error; counsel content themselves with a mere reiteration of the arguments rejected by him and by the majority of the court.

AMICI CURIÆ REFUSE TO ACKNOWLEDGE EXISTENCE OF JURISDICTION OVER SUBJECT MATTER.

The trouble with all of the arguments advanced by these friends of the court, as well as those of respondent's counsel, is that they refuse to acknowledge the existence of general jurisdiction over the subject matter of the survey of

Mormon Island and insist upon discussing the problem *as if* nothing had been surveyed except the demanded area and as if it had been *determined* rather than *asserted* to be tide land. But we are confronted with these inescapable facts: there was an island (R. 44, 111, 165); it was "public land" (R. 44, 111, 165-6); its boundary had never been defined (R. 44-5, 111, 166); and concededly a government patent was regularly issued for that Island, officially known as Lot 1 of Section 8 of Township 5 South, Range 13 West, San Bernardino meridian (R. 168). We quote R. 210: "The court (referring to Exhibit 2): In other words, the Government properly issued a patent to the portion of the land colored white? Mr. Butts: Yes, Your Honor." *Amici curiæ* say at page 4 "No one, of course, would deny that the Department has authority to make a survey", and respondent does not really take a contrary position.

Norway in starting his survey was in exactly the same position as Von Leicht of the Knight case; one had a description of a peninsula calling for ordinary high water mark as the boundary and the other had a designated island bounded in law and in fact by ordinary high water mark. Each had a subject matter clearly within the jurisdiction of the department. Neither was supposed to include tide land within the limits of his survey. The Knight and San Francisco cases, *supra*, definitely hold that if such lands were included there was error and nothing more. It should be remembered that there is *no claim of fraud* in either instance.

CASES CITED BY AMICI CURIÆ ARE CONSISTENT WITH KNIGHT DECISION.

Counsel's own cases recognize the rule for which we contend as being applicable to the narrow circumstances presented at bar. *U. S.* v. *State Investment Co.*, 264 U. S. 206,

exemplifies the fact. The sole question there presented was whether the demanded strip was within the limits of the government patent. On authority of *Russell* v. *Land Grant Co.*, 158 U. S. 253 this was held to be a judicial question (see p. 211; also O. B. p. 43-45). The authority of the Cragin and Knight cases was also recognized, at page 212, but held not applicable to resurveys made after patent issued. The matter was discussed with reference to jurisdiction of the department to make resurveys, and it was held that there is ample jurisdiction to make resurveys as well as original surveys prior to the alienation of the lands by the Government but that after that time there is no jurisdiction whatever, it having been exhausted by the initial survey resulting in a patent. At this point "private rights" intervene, which were said in the Crowell case, 285 U. S. at 50, to be the determinative feature. In other words there are, prior to grant of public lands, no private rights involved; the survey is but an exercise of a governmental function. And, as said by Mr. Justice Lamar in the Knight case at page 181, the Secretary of the Interior "represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Attention should not be distracted from the fact that there was no private right in existence at the time of the Norway survey; the question lay between the Federal Government and the State of California; the latter had acquired its title in subordination to the future exercise of all paramount Federal powers such as those pertaining to the survey and disposal of public lands; this had been expressly recognized in the admission compact (see O. B. 46; also *Doran* v. *Central Pac. R. R. Co.*, 24 Cal. 245, 256); the State's title rested upon privity of estate in the same manner as does any other Federal grant. (See quotation from Ward v. Mulford, 32 Cal. 372, found at page 202 of 142 U. S.)

Counsel's case of *Kirwan* vs. *Murphy*, 189 U. S. 35, contains, at page 54, peculiarily pertinent language which is wholly consonant with petitioner's contention herein.

The opinion in *Wright* vs. *Roseberry*, 121 U. S. 488, was written by Mr. Justice Field. Its proper place in this discussion (and that of *Doolan* vs. *Carr*, 125 U. S. 618) is disclosed by that learned jurist's discussion at pages 212-14 of 142 U. S.

Decisions Dealing with Re-Surveys.

Cases cited by *amici curiæ* are largely those condemning resurveys made after title has vested in the government's grantee. There is nothing new here; it was just such resurveys that were held beyond the Department's jurisdiction in the Cragin case, supra. That these authorities do not cast any doubt upon the jurisdiction to make an original survey is made clear by the language of the court in U. S. vs. State Investment Co., 264 U. S. at 212 and in Kirwan vs. Murphy, 189 U. S. at 54.

These remarks also apply specifically to *Lane* vs. *Darlington*, 249 U. S. 331; *Greene* vs. *U. S.*, 274 Fed. 145; *Hardin* vs. *Jordan*, 140 U. S. 371; *U. S.* vs. *Rhodes*, 3 F. (2d) 771.

We apprehend the true distinction between the instant case and those involving resurveys after patent to be this; —that one who acquires title to unsurveyed land of the United States takes it subject to the ultimate determination of its boundaries by the prescribed agency of the United States; that the Land Department has jurisdiction to make such initial surveys at any appropriate time; but that, once a patent has been issued upon the strength of such survey and title has passed out of United States, the Land Department has exhausted its jurisdiction over the subject matter and nothing which it thereafter does can affect the title already vested. The first proposition is exemplified by *Stoneroad* vs. *Stoneroad*, 158 U. S. 240. In disposing of the

contention that the right to fix boundaries of an unsurveyed grant rests in the courts it was said, at page 251: "The second proposition is equally unsound. It presupposes the existence in the courts of the United States of a power to survey the public domain, and thus discharge a function confided by law to an administrative branch of the Government." And at page 250: "Indeed, the idea that the Act, whilst confirming the title, did not contemplate a survey for the purpose of marking its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter."

See also *Catholic Bishop of Nesqually* vs. *Gibbon*, 158 U. S. 155, 167; *Russell* vs. *Maxwell Land Grant Co.*, 158 U. S. 253, 256.

Other cases cited by *amici curiæ* merely ring the changes upon the proposition that once public land has been alienated the department has no further jurisdiction over it; but these cases are all distinguishable upon the ground that private right has intervened and that the departmental jurisdiction has been exhausted. They are all examples of the line of cases mentioned in 142 U. S. at pages 176 and 212. Without pausing to review them in detail, we respectfully submit that these remarks are fully applicable to the cases cited at the middle of page 7 of said brief, the middle of page 8, the whole of page 9, the whole of page 10 and pages 11-12.

Counsel's Claim of "Cutting Off Titles."

The misapplication of the cited cases is as apparent here as in the Knight case. Counsel's recurrent argument is that the effect of the Norway survey was to "cut off" title already vested in the State of California. This argument

but carries us around respondent's favorite circle another time or two. Who says that the *locus in quo* had already vested? No one knew prior to the survey of 1880 where the line was. No fraud is claimed. Norway said that the whole was upland, lying three to five feet above ordinary high water mark. His superiors in the Department passed upon the correctness of his work, making any "necessary corrections" (R. 687) and found after a "critical examination" that the survey was correct. The trial court has found that the demanded premises never were tideland (R. 174, 184); and the best that *amici curiæ* has said is that "There is evidence justifying the conclusion that the land was tideland when California was admitted to the Union." (p. 3). It is a far cry from this statement to a demonstration of the sufficiency of the evidence to overthrow the factual finding. And there is nothing in the assertion that the court declined to consider the evidence. His written opinion shows, at R. 161, that he did consider this evidence but only went so far as to say that "the conclusion *might* be drawn" that the land was tideland. We again refer to the unchallenged authorities, at pages 133-35 of our opening brief, to the effect that the ultimate and formal finding of the court must control all of these preliminary expressions and that incompetent evidence must be disregarded on appeal. (As to the incompetency of the oral evidence see O. B., p. 136-193).

POLLARD AND GOODTITLE CASES MISCONSTRUED

Pollard's Lessee v. *Hagan*, 3 How. 212, and *Goodtitle* v. *Kibbe*, 9 How. 471, were not overlooked in the *Knight* case. They were referred to at page 183.

Counsel have read too much into them. The reports of those cases do not disclose the making of the contention which is asserted at pages 7 and 8 of brief of *amici curiæ*

to have been the basis of the decision. Specifically, it does not appear that either of those cases was decided in the face of "specific contentions that the patents were conclusive."

Respectfully submitted,

GURNEY E. NEWLIN,
A. W. ASHBURN,
Solicitors for Petitioners.

(7008-C)